

CV-12-45045

Court File No.

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

JTI-MACDONALD CORP.

Plaintiff

– and –

ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyers or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE OF ISSUE: April 3, 2012 Issued by: R. MacDonald

Address of Court Office:  
393 University Avenue  
Toronto, ON M5G 1E6

## CLAIM

1. The Plaintiff claims:

- (a) a declaration that sub-section 13(1) of the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177 is of no force or effect;
- (b) the costs of this action; and
- (c) such further and other relief as this Honourable Court deems just.

### The Parties

2. The Plaintiff, JTI-Macdonald Corp. ("JTIM"), is a body corporate established pursuant to the laws of the Province of Nova Scotia, with its registered office in Halifax. Its headquarters are in Mississauga, Ontario and manufacturing facilities as well as research and development and other activities in Montréal, Québec. It is a member of the Japan Tobacco Group.

3. The Defendant, the Attorney General of Canada, has capacity to be sued pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

### JTIM

4. JTIM employs over 500 people across Canada. The company produces primarily manufactured cigarettes, plus fine-cut tobacco and cigars. Its main brand family is Export 'A'. Other brands include Camel, Winston, Vantage, Macdonald Special, Macdonald Select, More International, Studio and Legend.

5. The company is the smallest, with a 14% share of the legitimate domestic market, of the three major Canadian manufacturers which include Imperial Tobacco Canada ("ITC") and Rothmans Benson & Hedges ("RBH").

### Current Regulations

6. On September 22, 2011, the Governor in Council enacted the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177 (the “impugned Regulations”) pursuant to the *Tobacco Act*, S.C. 1997, c. 13, s. 17 and s. 33.
7. The impugned *Regulations* replace the labelling for cigarettes and little cigars which was required by the *Tobacco Products Information Regulations*, SOR/2000-272 (“*TPIR*”). The *TPIR* included the requirements for the health-related information that had to be displayed on tobacco products sold in Canada.
8. The impugned *Regulations* require, among other things, that sixteen health warnings, eight health information messages, and four “toxic emissions statements” be displayed, on a rotating basis, on each package of cigarettes or little cigars in the respective “display areas” for each as defined therein or on an inserted leaflet as expressly prescribed for each.
9. Sub-section 13(1) of the impugned *Regulations* requires that the portion of the principal display area of cigarette and little cigar packages occupied by the health warning messages be increased in size from 50% (as required by the *TPIR*) to at least 75%.
10. The impugned *Regulations* further modify the requirement of the *TPIR* by, among other things:
  - (a) requiring that a pan-Canadian toll-free “quit line” number and cessation Web portal be displayed as a part of each of the health warnings;
  - (b) requiring that new health information messages enhanced with the use of colour and graphic elements be displayed as a part of each of the health warnings; and
  - (c) requiring that the toxic emission statements, which had been required to disclose the levels of tar, nicotine and other smoke constituents in the product be displayed on a side of the packages, now consist of new health messages regarding smoke constituents and that these additional health warnings be attributed to Health Canada.

### **History of Health Warnings on Packages**

11. Health warnings first appeared on cigarette packages in 1972. They consisted of a single text warning attributed to the Minister of Health, displayed in both official languages on one side of the packages. Apart from an addition to the text in 1975, these health warnings continued until 1989.

12. Pursuant to the adoption of the *Tobacco Products Control Act*, S.C. 1988, c. 20, new health warnings were mandated by regulations and introduced in 1989. They consisted of rotating text-only messages in contrasting colours occupying 20% of the bottom portion of the principal display surfaces of cigarette packages.

13. The rotating warnings were extended in size and number in 1994. These messages occupied approximately 33% of the top portion of principal display surfaces, namely 25% for the messages and 8% for a thick border surrounding the message area.

14. In 2000, the Governor in Council enacted the *TPIR*, which provided for rotating, graphic health warnings covering 50% of the manufacturers' main package display surfaces. The *TPIR* also required that additional health information be included, either by way of leaflet insert or, in the case of slide and shell packages, on the upper slide-flap and back of the slide, and that a "toxic emissions statement" be displayed on another side of the package.

15. The impugned *Regulations* now have the effect of appropriating more than 75% of the principal display surfaces of cigarette packages from manufacturers.

### **JTIM's Fundamental Right to Communicate**

16. Packaging is an essential component of brand competition for tobacco manufacturers, including JTIM. It serves to communicate both the trade-mark and product information consumers rely on to identify, compare and choose tobacco products, easily and without confusion.

17. Distinctive product packaging is the primary tool for developing brand equity, innovation and non-price competition. Packaging serves to distinguish the brand from competing products.

18. The brand and trade-mark provide a means for the consumer to ascertain the origin of the product and that it has the attributes of a particular brand. It allows the consumer to make an informed choice between different products.

19. In increasing the size of the health warnings in the impugned *Regulations*, the Government of Canada is appropriating at least 75% of the principal display surfaces of cigarette packages, making them unavailable for manufacturers' trade-marks, branding and other product information.

20. This appropriation constitutes a severe and damaging restriction to JTIM's rights to communicate with its consumers and use its trade-marks, as well as consumers' rights to product information and fair competition.

21. This is further exacerbated by the fact that product packaging is essentially the sole means of communication left to tobacco manufacturers as a result of other legislative and regulatory restrictions (both federal and provincial) banning all forms of mass media advertising and sponsorship and the displaying of products at retail.

### **Unjustified Infringement of Freedom of Expression**

#### *a) The Expansion of Health Warnings Violates Consumers' and Manufacturers' Rights to Freedom of Expression*

22. The expansion of health warnings from 50% to at least 75% of the principal display surfaces of cigarette and small cigar packages is a violation of the rights to freedom of expression of both the Plaintiff and consumers, as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

23. This violation is not a reasonable limit which can be demonstrably justified in a free and democratic society.

#### *b) The Objective is Unclear*

24. The legislative background and circumstances behind the impugned *Regulations* make their actual objective at best unclear, particularly as regards the expansion of the health warnings to 75% of the packages. Legislated health warnings may have a valid objective for constitutional law purposes, provided such objective is genuinely to advance

the goal of reducing tobacco consumption in view of the health effects associated with tobacco use. Other objectives which do not further this goal of reducing tobacco consumption are not sufficiently pressing and substantial so as to justify an infringement of the freedom of expression rights at issue.

25. The expansion of health warnings to 75% is in any event not proportional to any valid objective which the impugned *Regulations* might be seeking to secure, as is particularized below.

c) *There is no Rational Connection Between the Expansion of Health Warnings and Reduction of Tobacco Consumption*

26. The impugned measure of expanding health warnings to 75% is not rationally connected to a goal of reducing tobacco consumption.

27. The Canadian public, both smokers and non-smokers, has exceptionally high levels of awareness that smoking involves health risks, and has had for decades. Expanding the size of health warnings will not increase such awareness.

28. The Government of Canada's own research studies have shown that the level of such awareness in Canadians was very high prior to the introduction of the 50% graphic health warnings in 2001.

29. Nevertheless, responsible officials at Health Canada embarked on a project to recommend the increase in size of the health warnings, and only subsequently sought evidentiary justification for that recommendation. That justification relied on attitudinal consumer survey research findings. As those officials knew, it is wrong to conclude, as a result of such studies, that expanding the health warnings would have any effect on tobacco consumption. In any event, the studies were methodologically flawed so as to predetermine the results obtained.

30. The expansion of the health warnings to 75% under the impugned *Regulations* have not been tailored to achieve the objective of reducing tobacco use. The expansion to 75% will not achieve this objective.

d) *The Impugned Regulations Go Beyond Minimal Impairment of Freedom of Expression*

31. The further expansion of the health warnings under the impugned *Regulations* result in an appropriation of more than 75% of JTIM's packages. Packages and trade-marks appearing on them are the property of the manufacturers and, in the current legal environment, constitute the sole remaining means by which manufacturers can make their trade-marks known, retain brand equity, and foster product choice and product communication to users of a legal product.

32. By contrast, the Government of Canada has all forms of communication available to it to convey smoking and health information to Canadians. It has complete control over the contents and extent of the information that it wishes to convey to the public, as well as the selection of media for conveying such information. It knows that the public receives information on tobacco and health from many sources other than tobacco packages. Should the Government of Canada wish to increase its communication to the public, it is free to do so in a myriad of ways without further limiting freedom of expression.

33. There are less restrictive, more targeted and proportionate alternative solutions which would avoid the unnecessary, unjustified and disproportionate introduction of larger health warnings. The half of the main display area of the packages now required by the *TPIR* to contain health warnings could be required to include new or different message content or designs and information on cessation services such as a "quit line". The Government of Canada could expand its own dissemination of information in respect of the health issues associated with smoking by using any of the other media at its disposal, including those forms of media which, unlike mandated health warnings, can serve to reach the increasing number of Canadians who choose to smoke contraband products and those who are not smokers. None of these solutions would infringe on the constitutionally guaranteed right of freedom of expression.

e) *The Infringement of Freedom of Expression by the Impugned Regulations is Disproportional to Any Benefit*

34. Until the 1990s, JTIM and its major competitors ITC and RBH occupied approximately 99% of the cigarette market, which consisted chiefly of premium brands

and was characterised by intense brand competition mostly through permitted means of communication with consumers.

35. Evolving restrictions on means of communication with consumers weakened non-price competition, which led to corresponding weakening or disappearance of premium brands. A value (discount) brand market emerged and rapidly developed based on price competition.

36. The market environment also limited significantly the ability of legitimate producers to defend their brands against the appearance of contraband cigarettes in the early 2000s. Such contraband goods consist for the most part of unpackaged, unbranded cigarettes produced by manufacturers operating illegally, and are widely distributed by criminal gangs at a fraction of the price of legal products, without collection or payment of taxes. As at 2010, contraband cigarettes occupied more than 18% of the Canadian cigarette market.

37. Contraband cigarettes do not bear the mandated health warnings, so that the warnings fail to remind a significant segment of the smoking population.

38. On the other hand, the trade-marks and package information of legitimate cigarettes assist the consumers in identifying the source and brand of the cigarettes and to know that these cigarettes are not illegal. They protect the consumers.

39. Cigarettes and little cigars are legal products, and there are approximately five million Canadian adults who choose to smoke. As Canadian citizens and consumers, they should receive the same respect from their governments as others regarding their lifestyle choices and have a right to information about the products offered to them. In the current legal environment, packaging has become the only means by which product information can be communicated efficiently to them.

40. JTIM's right to communicate with its customers as a manufacturer of a legal product, and the smokers' right as consumers of a legal product to be informed about the choice of products and information about them, has been restricted to next to nothing (other than the product packages) given the current legal environment. The further



appropriation of such packages by the Government of Canada is a substantial invasion of whatever remains of freedom of expression.

41. Extensive measures already in place have had effects detrimental to competition and consumer rights to product information and choice. The impugned *Regulations* represent a further assault on the flow of product information for consumers. The deleterious effect of the measure on the exercise of the narrow space of freedom of expression remaining will be substantial from the standpoint of the product manufacturer and consumers alike.

42. Sub-section 13(1) of the impugned *Regulations* is unconstitutional, unjustified and disproportionate.

43. The Plaintiff asks that this action be tried at the City of Toronto.

Date: April 3, 2012

**BORDEN LADNER GERVAIS LLP**

Barristers & Solicitors

World Exchange Plaza

1100 – 100 Queen Street

Ottawa, ON K1P 1J9

**Peter K. Doody** (LSUC No. 22423S)

**Nadia Effendi** (LSUC No. 49004T)

(613) 237-5160 telephone

(613) 230-8842 facsimile

Lawyers for the Plaintiff

JTI-MACDONALD CORP.  
Plaintiff

- and -

ATTORNEY GENERAL OF CANADA  
Defendant

CV-12-450445

Court File No.

ONTARIO SUPERIOR COURT OF JUSTICE  
Proceeding Commenced at TORONTO

### STATEMENT OF CLAIM



CERTIFIED TO BE A TRUE COPY THE ORIGINALS PROCESS ISSUED HEREIN DATE: <u>April 3 2012</u>	(COPIE ADHÉRENTIÈRE CERTIFIÉE ET CONFORME À L'ACTE INTRODUCTIF D'INSTANCE DÉLIVRÉ CI-JOINTS FAIT LE: <u>3 2012</u> )
SOLICITOR FOR THE AVOCAT POUR LE <u>Plaintiff</u>	

**BORDEN LADNER GERVAIS LLP**  
Barristers and Solicitors  
1100 - 100 Queen Street  
Ottawa ON K1P 1J9

Peter K. Doody (LSUC No. 22423S)  
Nadia Effendi (LSUC No. 490047)  
(613) 237-5160 telephone  
(613) 230-8842 facsimile

Lawyers for the Plaintiff

(File: 200331-000122)